



POLICE DEPARTMENT

December 24, 2013

MEMORANDUM FOR: Police Commissioner

Re: Police Officer Martin Phillips
Tax Registry No. 939223
Patrol Borough Brooklyn North Task Force
Disciplinary Case No. 2011-5123

The above-named member of the Department appeared before me on August 29 and October 23, 2013, charged with the following:

1. Said Police Officer Martin Phillips, while on-duty and assigned to the Brooklyn North Task Force, on or about April 29, 2011, was discourteous to Lieutenant Derick Seneus. (*As amended*)

P.G. 203-10, Page 1, Paragraph 5 GENERAL REGULATIONS

2. Said Police Officer Martin Phillips, while on-duty and assigned to the Brooklyn North Task Force, on or about April 29, 2011, failed to immediately comply with an order given by Lieutenant Seneus to place a suspect under arrest.

P.G. 203-03, Page 1, Paragraph 3 COMPLIANCE WITH ORDERS

The Department was represented by Scott Rosenberg, Esq., Department Advocate's Office, and Respondent was represented by Craig Hayes, Esq.

Respondent, through his counsel, entered a plea of Not Guilty to the subject charges. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

DECISION

Respondent is found Guilty of Specification Nos. 1 and 2.

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SUMMARY OF EVIDENCE PRESENTEDThe Department's Case

The Department called Captain Derick Seneus and Sergeant Claude Celestin as witnesses.

Captain Derick Seneus

Seneus, a 15-year member of the Department, is currently assigned to the 114 Precinct. He was a lieutenant assigned to Patrol Borough Brooklyn North Task Force (BNTF) between April 2010 and May 2012. On April 29, 2011, he was on duty assigned as BNTF patrol supervisor. Police Officer Claude Celestin was his operator. At approximately 7:00 p.m. that day, he observed individuals drinking alcoholic beverages in public on the corner of Vanderveer Place and Flushing Avenue. Seneus and Celestin approached the individuals and asked them for identification. A warrant check revealed that one of the individuals, Person A, had an active warrant. Seneus summoned Respondent to the scene to arrest Person A.

Respondent arrived at the scene with his partner, Police Officer Gonzalez. Seneus informed Respondent that he wanted him to take the arrest. Respondent replied that he could not take the arrest because he had not personally observed the violation. Seneus told Respondent that Celestin would sign an affidavit, but Respondent continued to insist that "you cannot make me" take the arrest because he had not observed the offense. When Seneus told Respondent that he would be suspended from duty if he did not take the arrest, Respondent replied that he was going to consult with his union delegate. Respondent proceeded to make a phone call that lasted approximately 30 seconds. Respondent made the call without asking for Seneus' permission to use his cell phone. After Respondent finished the call, he agreed to take the arrest.

Seneus described Respondent's demeanor during the incident as "angry, upset" and "kind of loud." Person A was standing nearby and there were other civilians in the area. Respondent apologized to Seneus the next day for his behavior.

On cross-examination, Seneus testified that he could not recall why he wanted Respondent to take the arrest rather than another available officer. He did not recall that Respondent had been assigned that night the task of driving another officer to Manhattan to take part in critical response work. Although Seneus did not recall Respondent asking why Person A was being arrested, he agreed that it was possible that Respondent had asked such a question. The first thing Seneus told Respondent when he arrived at the scene was that Person A had an open warrant. Seneus also informed Respondent that Person A had been stopped for an open container of alcohol.

Seneus did not recall ever telling Respondent to put his phone away. Seneus agreed that when an officer is assigned an arrest, the officer has to be very careful with how he prepares the arrest paperwork. Seneus never asked Respondent to "keep him out of it" when it came to paperwork or to keep his name out of the paperwork. Both Seneus and Celestin observed the violation.

Two to three minutes passed between the time Seneus first directed Respondent to take the arrest and the time Respondent agreed to take it. Seneus believed that a ten-day penalty would be sufficient to address Respondent's misconduct and so he issued Respondent a Command Discipline (CD) regarding this incident.

On redirect examination, Seneus explained that the Department Advocate's Office had made the decision that Respondent should be served with charges and specifications regarding this incident.

Sergeant Claude Celestin

Celestin, a ten-year member of the Department, is currently assigned to Police Service Area 1. He worked as a police officer in BNTF between February and August 2011. He testified that when Seneus told Respondent on April 29, 2011 that he was going to be assigned Person A's arrest, Respondent responded, "I wasn't there. It's not my collar. I'm not going to take it." When Seneus replied, "Yes, you're going to have to take it," Respondent turned his back, went to the car, and made a phone call. The call lasted two or three minutes. After the call, Seneus ordered everyone back to the command.

Celestin heard Seneus order Respondent to take the arrest two or three times. Celestin did not hear Respondent object to preparing arrest paperwork. Celestin prepared the supporting deposition. He did not know who prepared the rest of the paperwork.

On cross-examination, Celestin agreed that Respondent did not yell at Seneus. Celestin did not hear Respondent use any profanity. It was necessary that either Celestin or Seneus prepare the supporting deposition because they were the only members of the service to observe the offense. Celestin did not recall if Respondent made the phone call from inside or outside the car. He did not hear Seneus mention suspending or disciplining Respondent in any way. He was focusing on Person A and the other stopped individual while the exchange between Respondent and Seneus took place.

Respondent's Case

Respondent testified in his own behalf.

Respondent

Respondent, an eight-year member of the Department assigned to BNTF, recalled that at roll call on April 29, 2011, he was assigned to drive another officer to an antiterrorism detail located within Patrol Borough Manhattan South. Police Officer Pemberton called Respondent on his cell phone and told Respondent to call Celestin regarding an arrest that Seneus wanted Respondent to take. Respondent, who was on 42nd Street in Manhattan at the time, called Celestin. Celestin told Respondent that Seneus had an arrest for him and that he should hurry to the arrest scene. It took Respondent at least 15 minutes to get there.

When Respondent arrived at the scene, Seneus pointed across the street where four men were standing and told him, "Arrest that guy." The men did not appear to be doing anything illegal. When Respondent asked which man Seneus wanted arrested, Seneus told him not to ask any questions. Respondent then asked, "What is this about?" Seneus repeated that Respondent should not ask any questions. Respondent handed Celestin his handcuffs to make the arrest and stated, "Fine, whatever this is, I'll be the assigned officer because I don't know what's going on." When Seneus told Respondent that he would be the arresting officer, Respondent replied by stating that he would have to be the assigned officer because he was not willing to sign any paperwork. Respondent explained that what he meant by this statement was that he was not going to sign supporting depositions since he did not personally observe any offense. Seneus responded, "Oh, so you're not going to take my collar?" Respondent answered, "I didn't say I'm not taking the collar. I said I'm not signing any supporting dep (deposition) because you won't tell me what the collar is for." Seneus then repeated his instruction that Respondent take the arrest and Respondent repeated that he would be the assigned officer on the case but he would not be the arresting officer. He explained to Seneus that he was unwilling to sign any arrest

paperwork as that would constitute perjury. Seneus responded, "Tell me you're not going to take my collar so I can suspend you."

Respondent testified that after he and Seneus went back and forth about this as many as three times, he told Seneus, "This is ridiculous. I'm going to call my delegate." Seneus told Respondent that he was prohibited from picking up his phone. Respondent replied, "I can pick up my phone. I'm going to call my delegate because I'm feeling like you're trying to suspend me." Respondent believed at that point that Seneus was going to suspend him if he did not take the arrest and write on the arrest paperwork that he had observed the offense. Seneus never told Respondent that Celestin would complete and sign the supporting deposition.

Respondent telephoned his union delegate. Respondent made the call from the street. During the call Seneus instructed him to put the phone down. Seneus told Respondent that he was "playing with fire" and would be suspended for being on the phone. After a brief conversation with his delegate, Respondent told Seneus that he would take the arrest. Celestin placed Person A in handcuffs and handed him off to Respondent. After they had returned to the command, Seneus informed Respondent that the arrest was for "an open container with an ROW (return on warrant)." Seneus also told Respondent that he would be suspended if Respondent wrote Seneus' name on the arrest paperwork. Ultimately, Celestin prepared the supporting deposition.

On cross-examination, Respondent confirmed that he did not immediately comply when Seneus directed him to handcuff Person A, that he argued with Seneus about taking the arrest, and that he told Seneus that he would not sign any paperwork regarding the arrest. He also agreed that he had told Seneus, "I don't know what this is about. I don't know why you called me all the way from the city to arrest this guy, so I'll be the assigned officer." Respondent did not

consider this statement to be confrontational. Respondent agreed that Person A was standing across the street at the time and that other civilians were present at the scene.

Respondent conceded that he did not ask Seneus for permission when he decided to call his delegate and that Seneus never gave him permission to use a cell phone. Respondent confirmed that he told Seneus that the Patrol Guide permitted him to use his phone. Although Respondent agreed that he had disobeyed Seneus' directive that he not make a call on his phone, Respondent asserted that he did not consider this to be an act of discourtesy. Respondent conceded that he continued making the call even after Seneus yelled at him for making the call and being disobedient.

Respondent agreed that Seneus never specifically directed him to sign the supporting deposition regarding Person A. Respondent testified that he had assumed at the arrest scene that Seneus expected him to sign the supporting deposition regarding Person A.

On redirect examination, Respondent explained that usually the arresting officer is the member of the service who actually observed the offense being committed. It was Seneus' insistence that Respondent be the arresting officer that led Respondent to assume that Seneus expected him to sign the supporting deposition.

Respondent explained that he believed that his use of his cell phone to call his delegate was proper because at the time of this incident officers assigned to BNTF were allowed to carry their cell phones and use them while working and that supervisors sometimes communicated with officers via cell phone because cell phone contact was clearer and more direct than conversations via Department radios.

Respondent recalled that in a conversation he had with Seneus a few days after this incident, Seneus told him that he would be issued a CD and that he would also be assigned to a foot post. Seneus subsequently assigned Respondent to a foot post for a single tour of duty.

FINDINGS AND ANALYSIS

Specification Nos. 1 and 2

It is charged that while Respondent was on duty assigned to the BNTF on April 29, 2011, he was discourteous to Seneus and that he failed to immediately comply with an order given by Seneus to place a suspect under arrest.

Most of the facts regarding the interaction between Respondent and Seneus on April 29, 2011 are not in dispute. Respondent admitted that when Seneus directed him to take the arrest of a suspect (Person A) he did not immediately comply with Seneus' order to place the suspect under arrest because he had not personally observed the suspect commit any infraction. Respondent asserted that he was justified in not immediately complying with Seneus' order because if he signed a supporting deposition regarding the arrest he would be committing perjury. However, on cross-examination Respondent admitted that Seneus never told him that he had to sign a supporting deposition; that he just assumed that Seneus expected him to sign the supporting deposition; and that when it came time to prepare and sign a supporting deposition, Celestin did this.

Since Respondent's justification for not immediately complying with Seneus' order to arrest a suspect on the street was based on a faulty assumption that he would later have to sign a supporting deposition after they returned to the command, Respondent's failure to immediately comply with Seneus' arrest order was unjustified.

With regard to the discourtesy charge, Respondent admitted that he told Seneus, "This is ridiculous. I'm going to call my delegate." Respondent's admission that he replied to Seneus' repeated demands that he arrest a suspect by making the completely unnecessary, and therefore gratuitous, comment that "this is ridiculous" constituted verbal discourtesy to a supervisor. Moreover, Respondent admitted that even though Seneus told him not to pick up his cell phone, he picked it up anyway, telephoned his delegate and engaged in a conversation with his delegate in Seneus' presence. In Case No. 2007-83549 (Dec. 4, 2008), an officer who was being questioned by a sergeant received a call on his cell phone. The officer turned away from the sergeant and began to speak on his cell phone. The officer was found guilty of having been discourteous to the sergeant because his action of taking the call and speaking on his cell phone while a supervisor was addressing him was rude and, therefore, discourteous.

Respondent is found Guilty of Specification Nos. 1 and 2.

PENALTY

In order to determine an appropriate penalty, Respondent's service record was examined. See *Matter of Pell v. Board of Education*, 34 NY 2d 222 (1974). Respondent was appointed to the Department on July 11, 2005. Information from his personnel record that was considered in making this penalty recommendation is contained in an attached confidential memorandum.

The Assistant Department Advocate (the Advocate) recommended that the penalty to be imposed on Respondent consist of forfeiting 30 vacation days and being placed on dismissal probation for one year. The Advocate did not cite any prior decisions to support this penalty recommendation. Respondent has no prior disciplinary record.

In Case No. 2007-83549 (Dec. 4, 2008), cited above, a 24-year officer who had no prior disciplinary record forfeited ten vacation days after he was found guilty of having been discourteous to a sergeant by taking an incoming call and speaking on his cell phone while the sergeant was addressing him.

In Case No. 2011-3967 (Sept. 10, 2012), a 13-year officer who had no prior disciplinary record forfeited 20 vacation days after he was found guilty of being discourteous to a lieutenant. In that case, after the officer had been ordered by a lieutenant to arrest a transit recidivist, the officer yelled, "This is bullshit!" in the presence of the suspect and another officer.

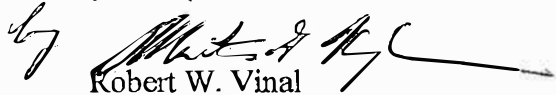
Here, although Respondent's "this is ridiculous" comment was made in the presence of the suspect, other civilians and other officers, Respondent did not yell at Seneus nor did he use any profanity. Moreover, Respondent did eventually comply with Seneus' order that he take the arrest of the suspect. Finally, Respondent apologized to Seneus the day after this incident.

Since Respondent has never been the subject of disciplinary charges, not even a command discipline, before or since this incident, Respondent's misconduct here appears to be an aberration from his normal conduct.

Therefore, it is recommended that Respondent forfeit 20 vacation days.

Respectfully submitted,

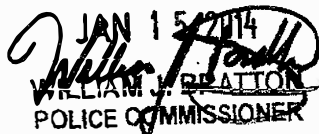
R.W. VINAL



Robert W. Vinal

Assistant Deputy Commissioner - Trials

APPROVED


JAN 15 2014
WILLIAM J. BRATTON
POLICE COMMISSIONER

POLICE DEPARTMENT
CITY OF NEW YORK

From: Assistant Deputy Commissioner - Trials
To: Police Commissioner
Subject: CONFIDENTIAL MEMORANDUM
POLICE OFFICER MARTIN PHILLIPS
TAX REGISTRY NO. 939223
DISCIPLINARY CASE NO. 2011-5123

Respondent received an overall rating of 3.0 on his 2011 performance evaluation, 3.0 on his 2010 evaluation, and 3.0 on his 2009 evaluation. He has been awarded one Excellent Police Duty medal. [REDACTED]

[REDACTED] He has no prior disciplinary record and he has no monitoring records.

For your consideration.

R. W. VINAL
by [Signature]
Robert W. Vinal
Assistant Deputy Commissioner Trials